United States Court of Appeals

for the Second Circuit

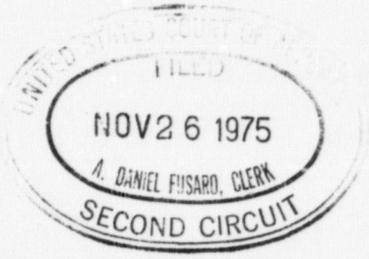
APPELLANT'S REPLY BRIEF

75-7344

IN THE

UNITED STATES COURT OF APPEALS

For the Second Circuit



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PLS

No. 75-7344

ETHEL BECKERMAN and ABRAHAM BECKERMAN,
on behalf of themselves and all other
participants in Times Square Associates,
similarly situated,

Plaintiffs-Appellants,

-against-

IRA JAY SANDS and F.S. MANAGEMENT CORP.,

Defendants-Appellees.

On Appeal From a Judgment in the United States
District Court For the Southern District of New York

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

PRELIMINARY STATEMENT

In order to adequately reply to the defendants-appellees' brief on this appeal, it will be necessary to place their Points in their proper perspective. The brief for the plaintiffs-appellants makes four mutually exclusive Points, i.e., if any one of them is sustained the judgment below must be reversed. In opposition, defendants-appellees brief sets forth five Points which, for analytical purposes, will be discussed in connection with the appellants' Points to which they apparently relate.

I

It is undisputed that aggregation of the claims of class members is permitted when class members hold their claims jointly or in common. The parties disagree as to whether the claims of the class members-investors in this case are so held by them or are held severally.

Plaintiffs assert that since Associates is a partnership, or a trust, or the investors hold their interests in the leasehold as tenants-in-common, or where the amounts diverted by the defendants are held as a fund for the investors, the investors hold their claims jointly or in common. Thus, whether Associates is a partnership or a trust or the investors hold their leasehold interests as tenants-in-common is merely a subsidiary issue. An affirmative determination of the subsidiary issue means that the claims are held jointly or in common, but a negative determination of the subsidiary issue does not close the inquiry of the principal question since class action claims can be held in common even when there is no partnership or trust or tenancy in common (Bass v. Rockefeller, 331 F.Supp. 945,S.D.N.Y. 1971; Brandt v. Owens-Illinois, Inc., 62 F.R.D. 160, S.D.N.Y. 1974).

The defendants oppose this line of reasoning with two points. In their Point I they argue that the claims of the investors are several and in their Point IV they argue that the investors were never partners in Associates. Significantly absent from the defendants' brief is any statement why Associates is not a trust as indicated in Brotman v. Meyers

(41 A.D.2d 547 (1973)), and on pages 32-33 of the plaintiffs' principal brief. Also absent from defendants' brief is any statement as to why the investors do not hold the leasehold as tenants-in-common, as set forth on pages 33-34 of the plaintiff's principal brief. Defendants do make the unsupported statement that "...since 1966 [Associates] has been neither a partnership, a corporation, nor a trust, but is a tradename used by Sands individually as agent for the investors." (Page 5 of defendants' brief). While the plaintiffs present much objective evidence to the contrary (as set forth on pages 20-33 of their principal brief) the defendants present no objective evidence or arguments in support of their assertion. Notably absent from the record or from any statement outside the record is the assertion that Sands filed the certificate of doing business as required by Section 440 of the New York Penal Law, which certificate he would presumably have filed had he really considered Times Square Associates merely to be his own tradename. The defendants further assert on page 14 of their brief that "The form and substance of plaintiffs' participation agreement were the same as commonly used by real estate syndicators in New York City in selling participating interests." But that does not tell us the nature of the participating interests in the commonly used real estate syndicate, even if it were relevant and applicable here, which it is not. The Judges of this Court, of their own knowledge, undoubtedly know that real

estate syndicates in New York City have over the past twenty years taken the form of limited partnerships, general partnerships, corporations and trusts. The defendants' discussion on page 15 of their brief of the Hotel Taft syndication by Alvin S. Lane is equally irrelevant. The details of that syndication and the agreements relating to it are not part of the record in this case and, consequently, cannot be evaluated and, even if they were part of the record, cannot have any bearing on the determination of the rights of the parties in this action.

In opposition to plaintiffs' first Point, the defendants argue that the rights of the investors are not derived from a common title because each investor had a separate contract. It may be true that each investor signed a separate piece of paper but each of those papers provided:

> "13. This agreement shall be binding upon all the Participants, their heirs, legal representatives, successors and assigns, and will be executed in counterparts, all of which when taken together will constitute one original." (A-15)

Also, the third "WHEREAS" clause reads:

> "WHEREAS, by agreement, said Partnership has designated Ira Sands, Jerome Wishner and George Gewanter to act as Nominee for all of the partners, and to thereby each distribute to the Participants herein, their undivided one-third interest to the entire Partnership asset, consisting of the beneficial ownership of the above leasehold." (A-11) (Emphasis added)

It will be noted that by the above language each of Sands, Wishner and Gewanter did not distribute a portion of his own interest in the partnership comprised of the three of them but rather the three of them together distributed interests in the leasehold which they, not the partnership, owned. Nowhere in their brief do the defendants attempt to explain away this language. Rather, they just argue as if it does not exist. Thus, when Judge Lasker said at A-72: "Each plaintiff has separate rights deriving from his separate contract with the defendants, and by its terms each contract here provides an individual right to sue the syndicate management" he apparently overlooked the foregoing provisions of the agreement since they are generally considered to be in the nature of "boiler plate".

In any event, whether the investors each had a separate contract or were all parties to the same contract is not determinative. In Berman v. Narragansett Racing Association, Inc. (414 F.2d 311, 1st Cir. 1969) the Court dealt with consolidated appeals from the district courts in New Hampshire and Rhode Island. In the New Hampshire case the members of the class did not even have written contracts with the defendant and, consequently, it is difficult to conceive of how they could all have derived their rights from a single contract. In the Rhode Island case there was apparently a written agreement between the

racetrack and the Horseman's Benevolent and Protective Association as agent for the horse owners, but the plaintiffs alleged that the association was not their authorized agent and was without legal right or authority to contract for them. Thus, even though that case was subsequent to Snyder v. Harris (394 U.S. 332 [1969]), the Court of Appeals permitted aggregation of the claims for jurisdictional purposes.

II

Plaintiffs' second Point is that the amount in controversy as to each member of the class exceeds $10,000. The defendants submit their Points II and III in opposition, but they do not really address the problem. Defendants do assert at page 32 of their brief that "It is a legal certainty that plaintiffs' claims are really less than the jurisdictional amount." [Emphasis in original]. But even if that was correct and even if Judge Lasker was correct in his determination of the substantive issues as to recoverable damages, it does not answer the question of when and how the legal certainty must must be determined in order for jurisdiction to be absent, and the defendants did not address themselves to it. In Colorado Life Co. v. Steele (95 F.2d 535, 536, 8th Cir. 1938) the Court said:

> "...Usually the amount claimed in a petition governs as to jurisdictional amount. This is, however, not universally true. One exception to the rule is where the face of the petition shows that there could not possibly be recovery

> of a sum equal to the jurisdictional amount - that is, if from the nature of the case as stated in the petition there could not legally be a judgment for an amount necessary to the jurisdiction, jurisdiction cannot attach even though the damages be laid in the petition at a sum larger than the jurisdictional amount." [Emphasis added).

This comports with the rule in St. Paul Mercury Indemnity Co. v. Red Cab Co. (303 U.S. 283 [1938]) that the amount of the plaintiffs' claim governs if it is made in good faith. On the question of good faith, in McDonald v. Patton (240 F.2d 424, 426, 4th Cir. 1957) the Court said:

> "...While good faith is a salient factor, it alone does not control; for if it appears to a legal certainty that the plaintiff cannot recover the jurisdictional amount, the case will be dismissed for want of jurisdiction... However, the legal impossibility of recovery must be so certain as virtually to negative the plaintiff's good faith in asserting the claim."

In Point II, the defendants state that the $326,000 claim is not made in good faith and is sham and fradulent. Assuming that the amount is wrong, mere error is far different from bad faith, sham and fraud, particularly when the basis of the claim is set forth in detail for full scrutiny. Defendants apparently concede a valid claim of $224,662 which arose before the commencement of the action. Whether the $101,763 which arose subsequent may be added to the claim is a legal question over which the parties differ. Defendants set forth in their Point III their reasons why the $101,763 may not be considered.

It is the plaintiffs' view, however, that the test for determining jurisdictional amount is "What is the subject

of the action?" Since the amended complaint seeks $326,000 of damages, that is the amount the parties are fighting about; that is the amount the Court must render judgment on. (See 1 Moore's Federal Practice, Par. 0.93[5.1-1]). Since the Court can allow amended and supplemental pleadings (F.R.C.P. 15), jurisdiction is tested in the light of such amended pleading (Grady v. Irvine, 254 F.2d 224, 4th Cir. 1950). See also Thompson v. Thompson (226 U.S. 551 [1913]). Even if the defendants are correct that only approximately $225,000 must be considered, that is only the starting point as it relates only to the first count of the amended complaint. To it must be added other claims which the defendants neglected to discuss in their brief. The first such additional item is the claim for punitive damages as set forth in the fifth count,[1] which if only trebled would be $675,000. Another item of controversy is set forth in the second count which seeks the recovery of the value of Associates' assets on the theory that since the fiduciary breached his duty the cestuis are entitled, in the discretion of the Court, to terminate their relationship and receive the value of the res. The third count seeks to impress a trust on the assets of F. S. Management into which the amounts it wrongfully received from Associates can be traced. While the amount is not presently known, plaintiffs should be entitled to conduct

1) It is immaterial whether the claim for punitive damages is considered a separate count or merely part of the first count.

discovery in order to ascertain the amount thereof so that it can be taken into account in determining the amount in controversy (Goldstein v. Compudyne Corp., 262 F.Supp. 524, S.D.N.Y. 1966; Blair Holdings Corp. v. Rubinstein, 159 F.Supp. 14, S.D.N.Y. 1954; Anderson v. B.O.A.C., 149 F.Supp. 68, S.D.N.Y. 1956). Finally, the fourth count alleges a claim of $414,000 under section 442-e, subdivision 3 of the New York Real Property Law. Thus, it is apparent that the claims being asserted on behalf of each member of the class exceeds $10,000. It is true that Judge Lasker held that the class members are not entitled to recover punitive damages or the penalty imposed by section 442-e of the Real Property Law. Those determinations are part of the within appeal and plaintiffs have already presented their arguments with respect thereto in their principal brief. However, even if the legal principles enunciated by Judge Lasker were correct they could only be invoked based upon evidence presented and not from the face of the complaint. While evidence outside the face of the complaint may be used to sustain a defense, the fact that the defense is later sustained does not oust the Court from jurisdiction. Thus, even if Judge Lasker were correct in his determination that the investors are not entitled to punitive damages or the Real Property Law penalty, the amounts claimed therefor, so long as made in good faith, may be taken into the calculation of

the amount in controversy. While the Court might ultimately deny the investors those punitive amounts, the papers plaintly indicate the basis upon which the claims are made and that they are made in good faith. Professor Moore has stated the distinction very aptly. In 1 Moore's Federal Practice 836-837 (Par. 0.92[2]) he said:

> "...And a court should not confuse the determination of its jurisdiction with an adjudication on the merits of the validity of the amount claimed. [This is what Judge Lasker did.] Even if part of the claim is dismissed by summary judgment on the issue of statute of limitations, thereby reducing the remainder to an amount lower than the jurisdictional minimum, the court still has jurisdiction to adjudicate the rest of the claim."

Significantly, the defendants do not take issue with the principle set forth in plaintiffs' Point III (pages 53-56 of their principal brief) that once jurisdiction has been found (as Judge Lasker did in his memorandum of October 11, 1973 (A-31)) it is not lost when the correct amount of the claim is subsequently found by the Court. Defendants do not even discuss cases cited by the plaintiffs, presumably because the defendants recognize that the cases support the proposition urged. Defendants only assert that the plaintiffs' claims were made in bad faith and are sham and fraud. Their Point II goes no further than making that assertion but, as indicated above, the most they have shown, if anything, was "error" which, as indicated in Mercer v. Byrons (200 F.2d 284, 1st Cir. 1952), is not bad faith.

III

Plaintiffs' Point IV is that Judge Lasker should not have dismissed the derivative claim brought in the right of Associates. Defendants do not make a separate point in opposition, but they do assert that "a derivative action may not be brought on behalf of an individual or ordinary partnership." (Page 5 of defendants' brief). Whatever might be the rule in the case of an ordinary partnership, this is not an "ordinary partnership" since, under the agreement the investors do not have the right to act for the firm. Like the partnerships in United States v. Silverstein (237 F.Supp. 446, S.D.N.Y. 1965, aff'd. 344 F.2d 1016) and Pawgan v. Silverstein (265 F.Supp. 898, S.D.N.Y. 1967) Associates is closely akin to a limited partnership, and under section 115-a of the New York Partnership Law a derivative action may be maintained in the right of a limited partnership. In addition, as stated earlier, Associates is also a trust and it is clear that a derivative action can be maintained in the right of a trust (Robinson v. Adams, 81 App.Div. 20, [1903]).

The defendants also argue on page 5 of their brief that no appeal can be taken from Judge Lasker's order dismissing the derivative claim alleged in the original complaint since the plaintiffs filed an amended complaint. It is true that in the usual case an amended complaint supersedes everything that was in the original, but when the amended complaint

was filed pursuant to a court order which directed that the derivative claim be excluded the plaintiffs should not be penalized for complying with that court order. That issue has never been dealt with by this Court but only by the Courts of Appeal for the Ninth and Tenth Circuits, and as to those two courts there seems to be a difference of opinion. The Ninth Circuit held in Loux v. Rhay (375 F.2d 55 [1967]) that by filing an amended complaint the plaintiff waives any error in the ruling to the original complaint. That rule originally obtained in the Tenth Circuit but was changed in Blazer v. Black (196 F.2d 139 [1953]). The problem is briefly discussed in 3 Moore's Federal Practice 940-941 (Par. 15.08[and in 6 Wright and Miller, Federal Practice and Procedure, 392-394 (§1476). While Professor Moore does not opine on the matter, Professors Wright and Miller indicate their preference for the Blazer rule and their reasons therefor in the following language:

> "The notion that an amended pleading supersedes its predecessor poses a special problem for the party whose initial pleading has been dismissed with leave to amend. If he amends his pleading, does he waive his right to object to the court's dismissal of his original statement at some later point? Several courts have held that the amended pleading supersedes the original pleading in all respects so that an appeal from a subsequent judgment on the merits cannot involve an attack on the dismissal of the original pleading.
>
> A rule that a party waives his objections to the court's dismissal if he elects to amend is too mechanical and seems to be a rigid application of the concept that a Rule 15(a) amendment completely replaces the pleading it amends. Without more, the action of the amending party should not result in completely denying him the right to appeal the

> court's ruling. By way of contrast, if the motion to dismiss is denied and defendant answers and defends on the merits, he still retains the right to object to the denial of his motion to dismiss on an appeal from the ultimate judgment. Similar principles apply to plaintiff when he unsuccessfully moves to strike a defense as legally insufficient and later serves a reply by order of the court. It therefore is not logical to deny a party the right to appeal simply because he decides to abide by the court's order and amend his pleading rather than allowing judgment to be entered against him and taking an immediate appeal.
>
> The reviewing court also should consider the reasons why the party elected to amend. For example, a party may wish to avoid the expense and delay involved in a direct appeal from the dismissal of the complaint. Moreover, waiver should not be imposed without considering the possible prejudicial impact on the amending party. There is some very good support in the cases for a flexible approach. In Blazer v. Black, the district court granted defendant's motion to strike portions of the complaint and ordered plaintiff either to amend his pleadings to conform to the ruling or to proceed to trial on the complaint without the stricken allegations. Plaintiff amended his complaint but on appeal from a directed verdict in favor of defendant, challenged the order to strike on the ground that eliminating the allegations had the effect of changing the claim asserted in the original complaint. In a strong dictum, Judge Murrah, speaking for the Tenth Circuit, stated that a party who amends his pleading to conform it to a court ruling only waives his objections to that order insofar as it applies to technical defects in the pleading; he does not waive his exceptions to rulings that strike a "vital blow" to a substantial portion of his claim. This seems to be a reasonable standard for determining when a party who amends his pleadings to avoid dismissal should be permitted to assert the court's alleged error in its original determination on appeal." [Footnotes omitted].

This sums up the plaintiffs' view of the issue and, if this Court reaches the issue on this appeal, respectfully suggests that the principle enunciated by Judge Murrah is more realistic

and equitable and should be adopted as the rule in this Circuit.

IV

As a separate Point V, the defendants urge that the plaintiffs are not proper parties to conduct this class action, asserting that plaintiffs are bringing it primarily for their own personal benefit.

Defendants charge that Ethel Beckerman has attempted to bribe the building superintendent and former employees of Associates in an attempt to take over the management of the building. To suggest that an elderly woman who resides in Florida wants to take over the management of a commercial building in the heart of Times Square borders on the ridiculous.

Plaintiffs are disqualified from bringing a class action only when their interests are adverse to the members of the class they seek to represent. Here, the interests of the plaintiffs and the class members are identical. Indeed, the investors who are the class members organized an Investors Committee and appointed Mrs. Beckerman to that Committee (Rec. #47, par. 16). Plaintiffs stand in exactly the same shoes as the other investors and will derive no additional or different benefit from the successful prosecution of the action. The three cases cited on page 40 of the defendants' brief are clearly inapplicable. In Maynard, Merel & Company v. Carcioppolo (51 F.R.D. 273, S.D.N.Y. 1970) the plaintiffs sought to enjoin a merger of two corporations and thereby preserve

their rights of first refusal to a subsequent underwriting and a directorship in one of the corporations. The Court found that to be the plaintiffs' paramount interest in undoing the merger and that they would be less likely than the class members to accept the offer of a cash settlement even though such settlement might be desired by the other members of the class and in fact be in the best interests of the class. In Lynch v. Sperry-Rand Corporation (62 F.R.D. 78, S.D.N.Y. 1973) plaintiffs were union officials who sued in their individual capacities as employees on behalf of all present and former male employees of an employer whose pension plans allegedly discriminated, in violation of the Civil Rights Act, against male employees and retirees in favor of women in similar status. The Court found a conflict between the plaintiffs and the class members since the plaintiffs' union official and the provisions of the pension plans were the result of collective bargaining between the unions and the employer and, if the action was successful, the union might be liable to the male employee class for damages suffered from pension plan discrimination. Finally, in duPont v. Wiley (61 F.R.D. 615, D.C. Del. 1973) Mr. duPont was the sole stockholder in a corporation known as Sci-Tek which had brought a separate anti-trust suit for $150,000,000 against the corporate defendant, University Computing Company, and in a second unrelated action Sci-Tek had a counter-claim for fraud and deceit against U.C.C. in the amount of $10,000,000. In addition, Mr. duPont owned only 5 shares of

U.C.C. for which he had invested $160 while the then current net worth of U.C.C. was approximately $62,000,000. The Court found that Mr. duPont's interest lay primarily in the two unrelated claims against U.C.C. totaling $160,000,000 and that if his wholly owned corporation was successful there would be nothing left for the members of the class in the cited case. As indicated, these cases are clearly not applicable here since the defendants have not shown any way in which the interests of the Beckermans are adverse to the interests of the other investors.

Defendants also mention in their Point V that Bernard Brown brought a similar action against these defendants in the New York courts. Aside from that being outside the record in this case, it is also irrelevant. Since it has been raised, however, this Court should be told that defendants made a motion in the New York court to dismiss that action on the ground of another action being pending between the same parties for the same cause, namely, this action. Mr. Brown's contention on that motion is that the two actions are between different parties and each may be prosecuted separately and that the first judgment secured will be determinative in the other case (Dresdner v. Goldman Sachs Trading Corp., 240 App.Div. 242 [1934]; Hirshfeld v. Fitzgerald, 157 N.Y. 1966 [1898]). That motion is presently sub judice.

V

For all of the foregoing reasons, as well as those set forth in the plaintiffs' principal brief, it is respectfully submitted that the Court below was in error in dismissing the amended complaint and the derivative claim in the original complaint and, consequently, the judgment should be reversed.

Respectfully submitted,

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